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No._____

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IN THE

Supreme Court of the United States

October Term, 1983

UNIVERSITY OF NEW MEXICO, MUSEUM OF NEW MEXICO and NEW MEXICO STATE PARK AND RECREATION DIVISION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAUL BARDACKE
Attorney General of New Mexico

CHARLOTTE URAM
BRUCE THOMPSON
Assistant Attorneys General

P. O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6000

DOUGLAS SEEGMILLER
P. O. Box 1769
Albuquerque, New Mexico 87103
(505) 842-8155

Counsel for Petitioners

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QUESTION PRESENTED

Whether the United States may bring an action to recover money damages for an Indian tribe against a state, despite the protections of the Eleventh Amendment, by filing the action in its own name.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, University of New Mexico, Museum of New Mexico and New Mexico State Park and Recreation Division, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 9, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 731 F.2d 703 (10th Cir. 1984), appears in Appendix A. The memorandum opinion and order of the District Court for the District of New Mexico appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 9, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The United States filed this suit "in its own capacity and as trustee for the Indians of the Santa Ana Pueblo" pursuant to 28 U.S.C. § 1345. R-14. The United States alleged that one or more of the Petitioners, University of New Mexico, Museum of New Mexico and New Mexico State Park and Recreation Division, had trespassed on 11.8 acres of land owned by the Pueblo of Santa Ana. The complaint sought money damages.[1]

Without reaching the trespass issue, the District Court found on a motion to dismiss that the Eleventh Amendment was a bar to the action for damages. While acknowledging that a suit by the United States against a state is not barred by the Eleventh Amendment, the District Court found that the United States had no real and direct interest of its own in the recovery of

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[1] The original complaint also sought ejectment. The District Court, pursuant to a stipulated order, dismissed without prejudice all claims other then the claim for money damages resulting from the alleged trespass.

damages and that by lending its name as a nominal party to the lawsuit it could not overcome the Eleventh Amendment.

The Tenth Circuit Court of Appeals reversed the District Court, applying the same standards as the District Court but holding that the United States has a sufficient interest in the recovery of money damages to bring the action in its own name and avoid the Eleventh Amendment. The interest of the United States was found to exist as part of a guardian relationship between the United States and Indian tribes.

REASONS FOR GRANTING THE WRIT

This case addresses federal, state and tribal relations in a new context. It sets the constitutional protections of the Eleventh Amendment against the federal and tribal interests in allowing Indian tribes to recover money damages from states. This constitutional tension will arise with increasing frequency: the Eleventh Amendment question is central to thousands of existing and potential federal suits. This case presents the question clearly and without extraneous arguments. It is therefore an appropriate vehicle for clarifying the federal responsibility to tribes and the effect of that responsibility on the constitutional protections provided to states.

1. THIS CASE RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW AND THE RELATIONSHIP BETWEEN STATES, THE FEDERAL GOVERNMENT AND INDIAN TRIBES.

The Eleventh Amendment traditionally would have precluded an Indian tribe from bringing this trespass suit seeking money damages from a sovereign state. *United States v. Minnesota*, 270 U.S. 181, 195 (1926). The question here is whether the Eleventh Amendment is avoided by having the United States file the action against the state.

The Eleventh Amendment to the Constitution provides a limited form of sovereign immunity. *Arizona v. California*, ___U.S.___, 103 S.Ct. 1382, 1389, n. 4 (1983). When the Constitution was read to abrogate the sovereign immunity of the states in *Chisolm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), the response was overwhelming and understandable; it "literally shocked the Nation." *Edelman v. Jordan*, 415 U.S. 651, 662 (1974). It took only five years to reverse *Chisolm* by adoption of the Eleventh Amendment, which now prevents the diversion of public funds for private purposes, the disruption of public services and safety, and governmental involvement in endless embarrassments, difficulties and losses harmful to the public interest.

The petitioners in this case represent the type of public interest which the Eleventh Amendment is designed to protect. The University of New Mexico provides the public with the means to acquire knowledge of literature, the sciences and arts, N.M. Stat. Ann. § 21-7-2 (1978). The Museum of New Mexico collects and preserves objects of historical, archeological, and artistic interest for the benefit of the public, N.M. Stat. Ann. § 18-3-3 (1978). The third petitioner, the New Mexico Park and Recreation Division of the Natural Resources Department, develops, maintains, manages, and supervises state parks and recreation areas for public use. N.M. Stat. Ann. §§ 16-2-6 through 16-2-8 (1978).

The State's immunity under the Eleventh Amendment is not unlike, although more limited than, tribal sovereign immunity. Indian tribes have available to them the protections of sovereign immunity to prevent interference with their governmental functions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940); *Garreaux v. Andrus*, 676 F.2d 1206, 1209 (8th Cir. 1982); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 522 (5th Cir.

1966). Sovereign immunity is also invoked by the United States to protect its interests. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Yet, both the United States and the Tribe argued below that the State's limited Eleventh Amendment immunity fell when the United States filed suit in its own name seeking money damages for the Tribe. The case on which they relied, and on which the Tenth Circuit relied in its ruling, was *United States v. Minnesota*. There the Court allowed the United States to sue on behalf of the Chippewa Tribe. However, the only relief sought in *Minnesota* was the relief necessary to enable the United States to fulfill a specific treaty obligation to the Chippewas. That treaty obligation required the United States to apply proceeds from the sale of Chippewa land for the benefit of the Chippewas. The United States had instead given the Chippewa land to Minnesota in violation of the treaty.

Here, there is no treaty obligation between the United States and the Tribe pertaining to the land in question. The case does not fall within the exception provided in *Minnesota*, allowing the United States to sue for money damages for the benefit of a tribe. Instead, it comes within the principle also expressed in *Minnesota*, that if the Indians were the real party in interest and the United States only a nominal party, the Eleventh Amendment would bar the action. The Court in *Minnesota*, in expressing this general principle, relied on *North Dakota v. Minnesota*, 263 U.S. 365 (1923) and *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), where the Court had held that states could not bring actions against other states on behalf of their citizens and thereby avoid the Eleventh Amendment. *Minnesota*, 270 U.S. at 193.

Such conflicts between the sovereign interests of federal, state, and tribal governments lie at the base of intergovernmental relations in the United States. The issue here is significant in terms of defining and clarifying those relationships

and their relation, in turn, to the obligations and protections in the United States Constitution.

2. THE DECISION BELOW RAISES SIGNIFICANT ECONOMIC PROBLEMS FOR STATES, PROBLEMS THAT WILL BE RECURRING WITH INCREASING FREQUENCY.

The proliferation of cases in the federal courts evidences the growing significance of claims for damages based on trespasses to Indian lands. The federal statute of limitations on Indian land claims prosecuted by the United States, 28 U.S.C. § 2415, and the congressional mandate to the Bureau of Indian Affairs to identify such claims in the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Title I, §§ 2-6, 96 Stat. 1976-78, have accelerated the number of Indian trespass claims and thereby increased their relative importance. While not all alleged claims have merit and clearly not all involve states, on March 31, 1983, the Bureau of Indian Affairs published a list of nearly 30,000 potential Indian legal claims, the "vast majority" of which were trespass claims. 48 Fed. Reg. 13698-13920 (1983). Since the publication of this list tribes have had the opportunity to submit additional potential claims. These claims are still being investigated so the flood of litigation has not yet started. The importance of the issue presented by this case, in terms of sheer numbers of cases and potential impact on state finances, cannot be overstated.

The number of cases that will flood the federal courts based on the Tenth Circuit's decision is not limited to cases filed by the United States. The tribes themselves will be filing suits on their own behalf. In 1966 Congress enacted legislation giving the federal courts original jurisdiction over actions brought by Indian tribes which arise under the Constitution, laws or

treaties of the United States. 28 U.S.C. § 1362. Lower courts are concluding that 28 U.S.C. § 1362 abrogates the Eleventh Amendment for actions brought by Indian tribes against states to the extent that the United States could have brought the action on the tribe's behalf, and they are assuming the United States can bring actions on the tribe's behalf. *Oneida Indian Nation of New York v. State of New York,* 691 F.2d 1070, 1080 (2d Cir. 1982); *Charrier v. Bell,* 547 F. Supp. 580, 585 (M.D. La. 1982); *Confederated Tribes of the Colville Indian Reservation v. State of Washington,* 446 F. Supp. 1339, 1350 (E.D. Wash. 1978), *aff'd in part and rev'd in part on other grounds,* 447 U.S. 134 (1980); *Aquilar v. Kleppe,* 424 F. Supp. 433, 436 (D. Alaska 1976). Aside from the problem of these courts finding congressional abrogation of the Eleventh Amendment through a statute which did not specifically provide for such abrogation, contrary to this Court's requirement that such abrogation be by a specific congressional action, *Pennhurst State School and Hospital v. Halderman,* ___U.S.___, 104 S.Ct. 900 (1984), these cases greatly increase the number of actions that tribes in their own names can and will bring against states.

Furthermore, the Tenth Circuit's position that the Eleventh Amendment is not a bar to actions on behalf of Indian tribes may extend beyond trespass actions. The United States now claims it is equally applicable in water rights cases. In addition, 25 U.S.C. § 175 provides that "In all States and Territories where there are reservations or allotted Indians the United States shall represent them in all suits at law and in equity." Under the Tenth Circuit's decision the only discernible extent to which the Eleventh Amendment is a bar to any possible action by an individual Indian or tribe against a state is the unwillingness of the United States to file the action. The extent to which the United States is barred from bringing a tort action for money damages against a state for a trespass to Indian lands is a significant issue and cases raising the issue are and will

continue to be filed at a rapidly increasing rate. Deciding this issue at this time will give direction to many pending cases.

3. THE DECISION OF THE TENTH CIRCUIT IS BASED ON PERCEPTIONS OF THE FEDERAL TRUST RESPONSIBILITY WHICH ARE CONTRARY TO THE DESCRIPTION OF THAT RESPONSIBILITY RECENTLY EXPRESSED BY THIS COURT.

This Court in *United States v. Mitchell,* __U.S.__, 103 S.Ct. 2961 (1983) (Mitchell II), defined the scope of the United States trust responsibility to Indian tribes. This Court recognized a trust relationship was created where Congress expressly created a trust responsibility or where the federal government takes on or has control or supervision over tribal monies or property. *Id.* at 2972. The Tenth Circuit found a fiduciary obligation in the United States to Indian tribes to bring actions for trespass damages without finding an express statutory provision creating that fiduciary obligation or finding the necessary control or supervision over the tribal property.[2] The Tenth Circuit relied primarily on language from *United States v. Minnesota.* However, *Minnesota* involved a treaty creating a specific obligation in the United States with respect to the land of the Chippewas and *Minnesota* was not a case in tort for trespass damages. The decision of the Tenth Circuit confuses the federal-tribal trust relationship at a time when this Court has been clarifying that relationship.

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[2] Arguably the Tenth Circuit based its determination that the United States has a trust reponsibility to bring a trespass action for damages on behalf of a tribe on the Indian Nonintercourse Act. 25 U.S.C. § 177. Such a conclusion would directly conflict with *United States v. Mitchell,* 445 U.S. 535 (1980) (Mitchell I) where this Court held that a statute which was intended only to prevent alienation of Indian land and state taxation of such land did not create a trust responsibility in the United States to prevent damage to such land.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

PAUL BARDACKE
Attorney General of New Mexico

CHARLOTTE URAM
BRUCE THOMPSON
Assistant Attorneys General

P. O. Drawer 1508
Santa Fe, New Mexico 87504

DOUGLAS SEEGMILLER
P. O. Box 1769
Albuquerque, New Mexico 87103

Counsel for Petitioners

July 9, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.
April 9, 1984

UNITED STATES of America in its own right for and on Behalf of SANTA ANA INDIAN PUEBLO, Plaintiff-Appellant,

v.

UNIVERSITY OF NEW MEXICO, et al., Defendants-Appellees.

No. 83-1238

Ellen J. Durkee, Atty., Dept. of Justice, Washington, D.C., (F. Henry Habicht, II, Acting Asst. Atty. Gen., Washington, D.C., William L. Lutz, U.S. Atty., Herbert A. Becker, Asst. U.S. Atty., Albuquerque, N.M., and David C. Shilton, Atty., Dept. of Justice, Washington, D.C., with her on the briefs), for plaintiff-appellant.

Douglas Seegmiller, Albuquerque, N.M. (Robert C. Poole, of Poole, Tinnin & Martin, Albuquerque, N.M., with him on the briefs), for defendant-appellee University of New Mexico.

Bruce Thompson, Asst. Atty. Gen., Santa Fe, N.M. (Paul Bardacke, Atty. Gen., and Reginald J. Storment, Asst. Atty. Gen., Santa Fe, N.M., on the brief) for defendants-appellees Museum of New Mexico and New Mexico State Parks and Recreation Division.

Scott E. Borg, Judy A. Flynn-O'Brien, and Richard W. Hughes, of Luebben, Hughes & Tomita, Albuquerque, N.M., filed an amicus curiae brief on behalf of Pueblo of Santa Ana.

Before McWILLIAMS, BREITENSTEIN and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The United States, in its own capacity and as trustee for the Indians of the Santa Ana Pueblo, sued the University of New Mexico, the Regents of the University of New Mexico, the

Museum of New Mexico, and the New Mexico State Park and Recreation Commission under 28 U.S.C. § 1345. The United States sought ejectment of defendants from 11.8 acres of allegedly federally-protected tribal lands and damages for defendants' trespass.[1] The district court granted the Regents' motion to dismiss the claim for damages because of the immunity granted to the states by the Eleventh Amendment of the United States Constitution. It held that all of the defendants are instrumentalities of the State of New Mexico entitled to Eleventh Amendment immunity.[2] Relying upon *North Dakota v. Minnesota,* 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed.2d 342 (1923),[3] the court found that the United States could not

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[1] The Pueblo of Santa Ana is a tribal entity for which the United States Bureau of Indian Affairs recognizes trust responsibility. 46 Fed. Reg. 35360, 35362. Although the Pueblo of Santa Ana allegedly owns the land at issue in this case in fee simple, it is subject to the restrictions on alienation imposed by the Indian Nonintercourse Act, 25 U.S.C. § 177, made applicable to Pueblo lands by the Act of February 27, 1851, 9 Stat. 587. *See United States v. Candelaria,* 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926); *Alonzo v. United States,* 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied,* 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958). The United States alleges that sometime after 1935 the University and the other defendants physically invaded approximately 11.8 acres of land owned by the Pueblo without permission. The defendants deny the Pueblo's claimed ownership of the land, and they deny that any actionable physical invasion has ever occurred.

[2] On appeal no party disputes the correctness of the district court finding that the defendants are instrumentalities of the state that may assert Eleventh Amendment immunity.

[3] In *North Dakota v. Minnesota,* the Supreme Court recognized that a state had a sufficient interest in the health and prosperity of its citizens to bring suit against another state to enjoin the flooding of its own citizens' farmlands, but concluded that the Eleventh Amendment barred a claim for damages made on behalf of individual citizens. The Court held that the individual citizens were the real parties in interest with regard to the claim for damages because it was inconceivable that the state was "prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled." 263 U.S. at 375, 44 S.Ct. at 140.

lend its name to an action which was essentially a private suit against an unconsenting state. It found that the United States did not have sufficient monetary interest to bring the suit in its own right. After the court dismissed the other claims in the suit without prejudice pursuant to the parties' stipulation, the United States appealed. The only issue before us is whether the Eleventh Amendment bars the United States from bringing this action for recovery of damages.

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This amendment bars suits against a state brought by citizens of another state, of a foreign country, and of the state being sued, *see Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974), but it does not bar suits against a state by the United States. *Arizona v. California*, ___U.S.___, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); *United States v. Mississippi*, 380 U.S. 128, 140-41, 85 S.Ct. 808, 814-15, 13 L.Ed.2d 717 (1965).

We believe *United States v. Minnesota*, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed.2d 539 (1926), controls this case. There the United States brought a suit against the State of Minnesota to cancel patents to lands issued to the state or, if the state had sold the lands, to recover their value. The United States asserted that the patents had been issued in violation of treaties under which the United States "became obligated to apply the lands and the proceeds of their sale exclusively to the use, support and civilization of the Chippewas." *Id.* at 192, 46 S.Ct. at 300. Accordingly, in its prayer for relief the United States requested that the Court order "that the lands—or, where any have been sold, their value in their stead—be restored to the control of the United States," and that it decree "that the lands and moneys

are to be held, administered and disposed of by the United States" in accordance with its treaty obligations to the Chippewa tribe. *Id.* at 194, 46 S.Ct. at 300. Minnesota argued that the suit essentially was one brought by the Indians against the state and therefore was not within the jurisdiction of the Court; it claimed that the tribe was the real party in interest as the sole beneficiary of any recovery and that the United States was only a nominal party—"a mere conduit through which the Indians are asserting their private rights." *Id.* at 193, 46 S.Ct. at 300. The Court held that the United States had a direct interest in the Chippewa land controversy based on the United States' duty to aid and protect the Indians. The Court noted that the interest of the United States arose "out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194, 46 S.Ct. at 301. The Court rejected the argument that because the tribe could not sue the state the United States had no duty or right to sue. *Id.* at 194-95, 46 S.Ct. at 300-301.

> "[I]mmunity from suit is not based on and does not reflect an absence of duty. So the fact that the Indians could not sue the United States for a failure to demand that the State surrender the lands or their value does not show that the United States owes no duty to the Indians in that regard. Neither does the fact that they could not sue the State show that the United States is without right to sue her for their benefit. But it does make for and emphasize the duty, and therefore the right, of the United States to sue."

Id. at 195, 46 S.Ct. at 301.

In the case before us, the district court first attempted to distinguish *Minnesota* on the basis that the damage award would ultimately benefit the Pueblos. But in *Minnesota* the Court permitted an award of monetary damages for the

Chippewa lands that Minnesota had sold and that could not be restored to the United States by cancelling the patents. In *Minnesota*, the award would have been paid out of the state treasury and would ultimately benefit the tribe. Because the United States acted under its fiduciary obligation in bringing this trespass claim, it does not matter that the ultimate beneficiary may be the Pueblos. 270 U.S. at 193-95, 46 S.Ct. at 300-01.

The district court also attempted to distinguish *Minnesota* on the ground that the relationship of the United States to the Pueblos was different from its relationship to the Chippewas because the United States had specific treaty obligations to the Chippewas. That is a distinction without a difference. Congress has "pervasive authority, rooted in the Constitution, to control [Indian] tribal property." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83, 97 S.Ct. 911, 918, 51 L.Ed.2d 173 (1977). This authority is "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs." *Id.* at 86, 97 S.Ct. at 919. The Indian Nonintercourse Act, 25 U.S.C. § 177, has been perhaps the most significant congressional enactment regarding Indian lands. The Act's overriding purpose is the protection of Indian lands. *See United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 698 (9th Cir.1976). It acknowledges and guarantees the Indian tribes' right of possession, *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 348, 62 S.Ct. 248, 252, 86 L.Ed. 260 (1941), and imposes on the federal government a fiduciary duty to protect the lands covered by the Act. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

Congress extended the Nonintercourse Act to the Pueblos in 1851. Act of February 27, 1851, ch. 14, § 7, 9 Stat. 587. In the New Mexico Enabling Act, Congress declared that the lands of the Pueblo Indians "shall be and remain subject to the

disposition and under the absolute jurisdiction and control of the Congress of the United States." Ch. 310, § 2, 36 Stat. 557, 559 (1910). The Pueblo Lands Act of 1924 required that the United States, "in its sovereign capacity as guardian of said Pueblo Indians," file suits on their behalf to quiet title to their lands. Ch. 331, § 1, 43 Stat. 636. Section 17 of the Pueblo Lands Act reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act. *Id.* at 641-42.

The Supreme Court also recognized that Congress has assumed sufficient control over Pueblo lands to create a strong fiduciary duty in the United States. As the Court stated in *United States v. Chavez*, 290 U.S. 357, 362, 54 S.Ct. 217, 219, 78 L.Ed. 360 (1933),

> "[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

And in *United States v. Sandoval*, 231 U.S. 28, 47, 34 S.Ct. 1, 6, 58 L.Ed. 107 (1913), which held that Congress could validly prohibit the sale of intoxicating liquors to the Pueblos, the Court reasoned,

> "[T]he legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling."

The trial court indicated that the United States' obligation to the Pueblos is diminished because the Pueblos own their prop-

erty in fee simple. However, in *United States v. Candelaria*, 271 U.S. 432, 440-44, 46 S.Ct. 561, 562-63, 70 L.Ed. 1023 (1926), the Court expressly rejected the argument that the Pueblos' fee simple ownership impaired the guardianship duty or power of the United States. This Court also has recognized that the Pueblos are entitled to the same protection as other tribes regardless of their fee simple title, and "the intent of Congress to provide such protection cannot be doubted." *Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir.1976); *accord New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir.1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 572 (1977). Thus, we find no reasonable basis to distinguish the United States' duty to the Chippewas in *Minnesota* and its duty to the Pueblos in this case.

REVERSED AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,
vs. No. CIV–80–193 C
THE UNIVERSITY OF NEW MEXICO, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is presently before the Court on Defendant The Regents of the University of New Mexico's Motion to Dismiss the prayer for damages in the Second Amended Complaint. For reasons discussed herein, I find that this motion is well taken and should be granted.

Plaintiff, United States of America, in its own capacity and as trustee for the Indians of the Santa Ana Pueblo, seeks ejectment of the Defendants The University of New Mexico, its Regents, Museum of New Mexico and the New Mexico State Park and Recreation Commission from lands the United States holds in trust for the Pueblo. The United States also requests damages from the Defendants for trespass to these lands. In their motion, The Regents seek to dismiss only the claim for damages on the ground that it is barred by the Eleventh Amendment of the United States Constitution. The Eleventh Amendment, on its face, preserves the immunity of the states to unconsented suits brought in federal court by citizens of another state. The United States Supreme Court has construed the Eleventh Amendment in practical terms to also bar unconsented federal suits by citizens of the state being sued. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Edelman v. Jordan*, 415 U.S. 651 (1974). The same practical construction has been extended to bar federal

suits for monetary relief brought against a state by an Indian tribe.* *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974); *Narragansett Tribe of Indians v. Murphy*, 426 F.Supp. 132 (D.R.I. 1976); *United States v. Minnesota*, 270 U.S. 181 (1926).

The first matter for consideration is whether or not the prayer for damages is in essence one against the State of New Mexico. The Eleventh Amendment precludes federal actions against a state, its officers, agents and institutions, which are, in fact, part of the state function. This bar applies even though the state is not named, where the defendant is a state institution or agency and an arm or instrumentality of the state. *Korgich v. Regents of New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978). Although the Regents of the University of New Mexico are the only Defendants who have raised the Eleventh Amendment issue, I feel it is appropriate to consider on my own initiative this matter with respect to all the named Defendants. The Eleventh Amendment concerns the very power of this Court to adjudicate a claim. I find that all the named Defendants are immune from suits for damages as state agencies which are instrumentalities of the State of New Mexico.

The University of New Mexico and its Board of Regents are established by the New Mexico Constitution. N.M. CONST. art. 12, sections 11 and 13. The University is "a creature of the Constitution of the State of New Mexico" and its Regents who are sued here in their official capacities "owe their duties to the State of New Mexico." *See Womack v. Regents of the University of New Mexico*, 82 N.M. 460, 483P.2d 934 (1971); *Bailey v. Davis*, No. 80-690 (D.N.M. Jan. 8, 1981). The powers and duties of all the Defendants are spelled out by state statute.

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* Suits for monetary relief are distinguished from suits brought by Indian tribes for declaratory and injunctive relief against state officials alleged to have acted unconstitutionally or without authority. *See Ex Parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan, supra.*

Section 16-2-1, *et seq.*, N.M.S.A. 1978; Section 18-3-1, *et seq.*, N.M.S.A. 1978; Section 21-7-1, *et seq.*, N.M.S.A. 1978. They are all instrumentalities of the state and are, therefore, immune to claims for monetary relief. It is evident that the present action insofar as it seeks damages for trespass against the Defendants would be barred by the Eleventh Amendment if it had been brought by the Pueblo of Santa Ana. The question remains whether the request for damages may nevertheless be pursued by the United States in its own capacity or as trustee for the Pueblo.

This Court's original jurisdiction extends to suits by the United States against a state. *United States v. Mississippi,* 380 U.S. 128 (1965). The instant action for trespass and ejectment is properly before this Court in that the United States has a real and direct interest in the matter presented. This interest arises out of the United States' guardianship over the Indians and its duty to fulfill its fiduciary obligations; an interest which is vested in it as a sovereign. *United States v. Minnesota, supra; Heckman v. United States,* 224 U.S. 438 (1912). Although the United States has a real and direct interest as a sovereign in pursuing the trespass and ejectment action against the state, it does not necessarily follow that the United States has a real and direct interest in any damages recovered from the state as a result of the trespass. The Eleventh Amendment may not be circumvented where the United States lends its name as a nominal party to what is in effect a private citizen's claim for damages against a state. *Cf. North Dakota v. Minnesota,* 263 U.S. 365 (1923). In *North Dakota, supra,* the Supreme Court recognized that a state had sufficient interest in the health and prosperity of its citizens to bring suit against another state in order to enjoin the flooding of its own citizens' farmlands; however, a claim for money damages made by the complainant state on behalf of its individual citizens was barred by the Eleventh Amendment. The Supreme Court found that so far as the damage claim was concerned, the individual citizens

were the real parties in interest since it was inconceivable that the state was "prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled." *North Dakota, supra,* at 375. The reasoning found in the authority cited appears to apply equally to suits brought by the United States as trustee for an Indian tribe. *See United States v. Minnesota, supra; Standing Rock, supra.* The Plaintiff argues that the *Minnesota* decision indicates that an award of money judgment against a state is allowed even though it will ultimately benefit the Tribe. The *Minnesota* decision is distinguishable from the present situation. In *Minnesota,* the United States alleged that in its role as guardian it had an existing obligation by way of treaty and other engagements to apply the lands in dispute or the proceeds of their sale exclusively to the use and support of the Chippewa Indians. In its suit to either cancel the patents of the lands transferred to the state or to recover their value by way of money judgment if they had been sold by the state, the United States was seeking relief essential to fulfillment of its own specific obligations to the Chippewas. Unlike the circumstances in *Minnesota,* the prayer for damages in this action is not designed to vindicate any direct interest of the United States. The Pueblo is alleged to own the disputed land in fee simple. It is obvious that any damages recovered will go directly to the Pueblo since it is inconceivable that the United States would undertake to seek damages for trespass based on the Pueblo's title without intending to pay over the proceeds of any recovery to the Pueblo as owner of the land. For this reason, I find that the United States' prayer for damages against all of the Defendants on behalf of the Pueblo is barred by the Eleventh Amendment and should be dismissed.

IT IS, THEREFORE, ORDERED that Plaintiff's prayer for damages be, and it hereby is, dismissed.

s/ Santiago E. Campos
UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
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CLERK

No. 84-53

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNIVERSITY OF NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

DAVID C. SHILTON
ELLEN J. DURKEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Eleventh Amendment bars recovery of damages from the State of New Mexico in a trespass action brought by the United States in its own right and on behalf of an Indian tribe.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 731 F.2d 703. The relevant memorandum opinion and order of the district court (Pet. App. 8a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1984. The petition for a writ of certiorari was filed on July 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. In this action, the United States sought ejectment of petitioners from 11.8 acres of federally-protected tribal land and damages for petitioners' trespass. The United States

brought the action in its own capacity and as trustee for the Indians of the Santa Ana Pueblo, a tribal entity with respect to which the United States Bureau of Indian Affairs recognizes a trust responsibility. 46 Fed. Reg. 35360, 35362 (1981). The Pueblo lands, although owned in fee, are alienable only with the approval of the United States and the tribe is subject to the legislation of Congress enacted in the exercise of the government's guardianship over Indians and their property. *United States* v. *Candelaria*, 271 U.S. 432, 440 (1926); *Alonzo* v. *United States*, 249 F.2d 189, 196 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958). See Pet. App. 2a n.1.

2. While recognizing that the Eleventh Amendment does not apply to suits by the United States against a state, the district court nevertheless held that the Amendment barred the damage action. In the court's view, the United States could pursue the ejectment action but had insufficient interest in any money recovered from the State to maintain the claim for damages (Pet. App. 10a). On the assumption that the damage claim would have been barred by the Eleventh Amendment if brought by the Pueblo (Pet. App. 8a-9a), the court concluded that the United States cannot circumvent the Eleventh Amendment by bringing in its own name what is, in essence, a suit by the Pueblo against the State (Pet. App. 10a-11a). The district court reasoned that *United States* v. *Minnesota*, 270 U.S. 181, 195 (1926), was distinguishable because in that case the United States sought a monetary judgment to fulfull a treaty obligation, whereas here the action was not designed to vindicate any direct interest of the United States (Pet. App. 11a). In addition, the court suggested that the instant case differed from *Minnesota* because any monetary recovery would go directly to the Pueblo by virtue of the Pueblo's fee simple ownership of the land.

3. The court of appeals reversed. It held that *Minnesota* controlled the case and rejected the district court's attempts to distinguish it. The court observed that the award in *Minnesota*, as here, would have been paid out of the state treasury and would ultimately benefit the tribe (Pet. App. 4a-5a). Because the United States acted under its fiduciary obligation here, it did not matter that the ultimate beneficiary may be the Pueblo (*ibid*).

The court further held that there was no reasonable basis to distinguish the United States' duty to the Chippewas in *Minnesota* and its duty to the Pueblo in this case (Pet. App. 7a). The duty to the Pueblo is rooted in Congress' control and protection of Pueblo property, primarily through the Indian Trade and Intercourse Act, which guarantees Indian tribes' right of possession to tribal lands (Pet. App. 5a-6a). Finally, the court rejected the trial court's suggestion that the United States' obligation to the Pueblo is diminished because the Pueblo owns its property in fee simple (Pet. App. 7a). In so holding, the court relied on cases from this Court and the Tenth Circuit which have consistently rejected attempts to exclude Pueblo Indians from the benefits of federal protection generally applicable to tribal trust land which is owned in fee simple by the United States as trustee for the tribe (*ibid.*).

ARGUMENT

The court of appeals' decision is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The right of the United States to bring an action for monetary damages against a state based on a federal duty to protect tribal lands was the exact issue presented in *Minnesota*. In that case, the United States sued to recover Indian land (or the value of land) which had been conveyed to the State in violation of federal law. The State argued that the

suit was essentially one brought by Indians, the real parties at interest and the beneficiaries of any recovery, and that the United States was only a nominal party — a "mere conduit through which the Indians are asserting their private rights." 270 U.S. at 193. Accordingly, it was submitted that the case against the State, properly treated as a suit by Indians who were citizens of Minnesota, was barred by sovereign immunity and otherwise outside this Court's original jurisdiction.[1] But this Court held that the United States had a direct interest in the matter arising "out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194. Although it was assumed the Indians could sue neither the United States nor the State, the Court concluded that the United States had the duty, and right, to sue the State. *Id.* at 194-195.

That proposition — that the Eleventh Amendment is no bar to an action by the United States against a state for the benefit of Indians — has been re-affirmed many times, most recently in *Arizona* v. *California*, No. 8, Orig. (Mar. 30,

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[1]It may well be that both these conclusions would be different today. As petitioners themselves point out, several courts, invoking this Court's decision in *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 472-475 (1976), have held that 28 U.S.C. 1362 now permits Indian Tribes to sue States directly. Pet. 6-7. So, also, it is now settled that the kind of claim presented in *Minnesota* and in the present case "arises under" federal law for jurisdictional purposes. *Oneida Indians Nation* v. *County of Oneida*, 414 U.S. 661 (1974). Finally, we do not suppose the Court today would disclaim power to entertain, on its Original Docket, a case within federal jurisdiction to which a State is a party, albeit the other parties are citizens of the same State. Cf. *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261 (1895). Needless to say, however, none of these questions is presented here. For present purposes, we may assume that both *Minnesota* and this case were barred unless the United States was the proper plaintiff.

1983), slip op. 7-8, where the United States brought water rights claims on behalf of several tribes. The only question here is whether the present case is somehow exempted from the general rule. In our view, the court of appeals correctly rejected the asserted bases for distinguishing this suit.

2. This Court long ago repudiated any notion that the powers and duties of the United States touching the Pueblo Indians are any different than in the case of other Tribes, whether because the former own their lands in fee or otherwise. *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *Candeleria, supra; United States* v. *Chavez*, 290 U.S. 357 (1933). And the Court has likewise declined to distinguish between Indians whose land title is recognized by Act of Congress or Executive Order, rather than treaty. *Arizona* v. *California*, 373 U.S. 546, 595-597 (1963); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 133-134 n.1 (1982). The dispositive fact here is that the lands in question are protected by the Non-Intercourse Act, 25 U.S.C. 177, expressly made applicable by Section 7 of the Act of Feb. 27, 1851 (ch. 14, 9 Stat. 587), and by the Pueblo Lands Act of 1924 (ch. 331, 43 Stat. 63, amended by ch. 45, 48 Stat. 108 *et seq.*), which describes the United States as "guardian of said Pueblo Indians." At least in respect of their lands, the responsibilities of the United States in vindicating the Indian interest is no less in the case of Pueblo Indians and its standing to sue for that purpose is the same as for any other Indian tribe.[2]

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[2]The suggestion that the decision below is inconsistent with *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983); 445 U.S. 535 (1980), is frivolous. As *Minnesota* expressly recognizes, "the fact that the Indians could not sue the United States for a failure to demand that a State surrender the lands or their value does not show that the United States owes no duty to the Indians in that regard." 270 U.S. at 195.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

DAVID C. SHILTON
ELLEN J. DURKEE
Attorneys

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